No. 16-9493

In The Supreme Court of the United States

FLORENCIO ROSALES-MIRELES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, FAMILIES AGAINST MANDATORY MINIMUMS, AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER AND URGING REVERSAL

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QUESTION PRESENTED

To meet the standard for plain error review, is it necessary, as the United States Court of Appeals for the Fifth Circuit held, that the error be one that would "shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge"?

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INTEREST OF AMICI CURIAE[1]

Amicus National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system.

NACDL files numerous amicus briefs each year in the Supreme Court and other courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. NACDL knows that criminal defense attorneys sometimes make mistakes as they undertake their difficult but important duties. NACDL and its members strongly believe that the plain error rule, as interpreted by this Court, suffices to protect the appellate process, and that any more

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[1] Under S.Ct. R. 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Amici have obtained letters of consent to the filing of this brief from all parties.

stringent rule would tilt the system too far against fairness and justice for defendants.

Amicus Families Against Mandatory Minimums (FAMM) is a national, nonprofit, nonpartisan organization dedicated to promoting fair and proportionate sentencing policies and challenging inflexible and excessive penalties. FAMM's vision is a nation with a criminal justice system in which sentencing is individualized and humane, imposing penalties that are no greater than necessary to ensure just punishment, secure public safety, and support successful rehabilitation. Since its founding in 1991, FAMM has accomplished its purposes through public education, selected amicus filings in important cases, congressional efforts, and advocacy before the United States Sentencing Commission. FAMM's membership includes more than 30,000 federal prisoners with whom we routinely correspond, along with their loved ones on the outside. The majority of these prisoners are serving sentences imposed under the federal Sentencing Guidelines.

FAMM joins this brief on behalf of our members because we believe an error that results – or presents a reasonable likelihood of having resulted – in *any* additional prison time, for whatever reason, "seriously affects the fairness, integrity, or public reputation" of the sentencing proceeding.

Amicus National Association of Federal Defenders (NAFD), formed in 1995, is a nationwide, nonprofit, volunteer organization whose membership is composed of attorneys who work for federal public and community defender organizations authorized

under the Criminal Justice Act. Each year, federal defenders represent tens of thousands of individuals in federal court. Federal defenders often argue for the kinds of sentence differentials at issue in this case. They also frequently confront plain error review on appeal. Amicus NAFD therefore has both particular expertise and interest in the subject matter of this litigation.

SUMMARY OF THE ARGUMENT

1. The Fifth Circuit's "shock the conscience of the common man" standard for the fourth prong of the plain error standard cannot be reconciled with this Court's decisions. That standard – which the Fifth Circuit alone has adopted – finds no support in the language or rationale of *United States v. Olano*, 507 U.S. 725 (1993), and Fed. R. Crim. P. 52(b). Moreover, as applied here to render many errors in calculating the Guidelines sentencing range immune from effective plain error review, the Fifth Circuit's standard contravenes this Court's decisions in *Molina-Martinez v. United States*, 578 U.S. —, 136 S. Ct. 1338 (2016), and *Glover v. United States*, 531 U.S. 198 (2001). The Fifth Circuit's standard also improperly shifts the appellate court's focus from the impact of what this Court has called "significant procedural error," *Gall v. United States*, 552 U.S. 38, 51 (2007), to something akin to "substantive unreasonableness." *Id.* Those decisions make clear that *any* error which produces a longer prison sentence has constitutional significance, affects the public reputation of the courts, and warrants correction.

2. Because of the Guidelines' technical nature, it is easy to lose sight of the human consequences of a Guidelines error. Even a seemingly minor error that produces only a few months of additional incarceration can have a profound impact on a prisoner's family ties, medical treatment, and overall reintegration into society. Amici offer the stories of three defendants – Judy McCarroll, Mickey Randle, and Eric Galanti – to illustrate this point.

ARGUMENT

I. THE FIFTH CIRCUIT'S HOLDING CANNOT BE RECONCILED WITH THIS COURT'S DECISIONS.

The law is clear: the Fifth Circuit's refusal to reverse a sentence for plain error unless the result would "shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge" conflicts squarely with this Court's decisions.

The Court held in *United States v. Olano*, 507 U.S. 725 (1993), that a court of appeals "should correct a plain forfeited error affecting substantial rights if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 736. Nothing in that language – or in the language of Fed. R. Crim. P. 52(b), on which *Olano* rests – supports the Fifth Circuit's more stringent "shock the conscience of the common man" standard.

Two decisions from this Court highlight the court of appeals' error. In *Molina-Martinez v. United States*, 578 U.S. —, 136 S. Ct. 1338 (2016), the Court rejected a similar effort by the Fifth Circuit to make the *Olano* plain error standard more onerous. In *Molina-Martinez*, the district court determined the Guidelines range incorrectly, but its sentence fell within the correct range. The court of appeals held that to show that the Guidelines error had affected the defendant's "substantial rights" – the third *Olano* prong – the defendant had to present "additional evidence," beyond the Guidelines error, that the district court would likely have imposed a lesser sentence absent the error.

This Court rejected the Fifth Circuit's gloss on *Olano*. It emphasized the "central role" of the Guidelines in the federal sentencing regime, in which the Guidelines serve as a "'starting point and . . . initial benchmark.'" *Id.* at 1346 (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). The Court concluded that "[f]rom the centrality of the Guidelines in the sentencing process it must follow that, when a defendant shows that the district court used an incorrect range, he should not be barred from relief on appeal simply because there is no other evidence that the sentencing outcome would have been different had the correct range been used." *Id.*

Having failed in its effort to increase the defendant-appellant's plain error burden under *Olano*'s *third* (prejudice) prong, the Fifth Circuit seeks to accomplish the same result by its "shock the conscience of the common man" gloss on *Olano*'s *fourth* (discretion) prong. But that standard, like the

"additional evidence" requirement in *Molina-Martinez*, lacks any basis in *Olano* and Rule 52(b). Moreover, in the sentencing context the "shock the conscience" standard overlooks the central role that the Guidelines play in determining a federal sentence. Even an erroneous one-level increase in the Guidelines range can produce an increase of months or years in a defendant's prison term. The same is true of a one-category error in criminal history scoring, as occurred in petitioner's case. Such an increase "seriously affects the fairness, integrity, or public reputation of judicial proceedings," *Olano*, 507 U.S. at 736, regardless of whether it also would "shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge."

The idiosyncratic standard invented and applied by the court below also appears to confuse appellate review of a sentence for *procedural* regularity (in which the correctness of the Guidelines calculation is included; *see Gall*, 552 U.S. at 51), with a sort of heightened standard of *substantive* reasonableness. Whether the length or other severity of the sentence would "shock the conscience of the common man" reflects (in an exaggerated way) the latter form of review, which is entirely separate from the former. To obtain appellate reversal on account of "significant procedural error," *id.* – as here, where petitioner's criminal history category was miscalculated due to a careless error by a U.S. Probation Officer that went uncorrected by defense counsel, by the government, or by the court – there is no requirement that the defendant *also* show that the sentence imposed was

substantively unreasonable, that is, plainly excessive.[2] The test invented by the Fifth Circuit thus examines the "plainness" of the wrong error (the ultimate severity of the sentence, rather than the miscalculation of petitioner's prior record).

A court is required to review for plain error the claim on which a defendant predicates his appeal. The criminal history error in this case affects the procedural, not the substantive, reasonableness of the sentence. The reputation of the courts would be adversely affected by a public perception that appellate judges are not concerned when it is pointed out that no participant in the process managed to avoid simple mistakes in determining the defendant's prior record.

This Court's decision in *Glover v. United States*, 531 U.S. 198 (2001), underscores that even a small error in the Guidelines determination must be deemed worthy of correction. In *Glover*, the defendant's counsel performed deficiently in failing to argue for grouping of counts under U.S.S.G. § 3D1.2. The resulting Guidelines error produced a sentence 6 to 21 months longer than it should have been. The court of appeals held that the slightly longer sentence did not suffice to establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). In reversing, this Court declared that "*any* amount of actual jail time has Sixth Amendment significance." 531 U.S. at 203

[2] Proper appellate review for substantive unreasonableness asks whether the district court abused its discretion in concluding that the sentence it selected is "sufficient, but not greater than necessary," 18 U.S.C. § 3553(a), to achieve the purposes of punishment.

(emphasis added). Just as "any amount of actual jail time" constitutes prejudice under *Strickland*, so any reasonable probability of additional jail time resulting from Guidelines error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736. In petitioner's case, the court imposed a low-end sentence of 78 months, a mere month above the floor of the erroneously calculated range of 77 to 96 months. The Fifth Circuit's decision meant that the district court was not permitted to reconsider the punishment, including whether to resentence petitioner to the low end of the now properly calculated range of 70 to 87 months.

The increase in petitioner's Guidelines range resulted, in this case, from the failure of anyone involved to notice that the same prior conviction was being counted twice. That sort of unconcern for "getting it right" surely goes to the integrity of the process as well as its fairness. It would seriously affect the public reputation of judicial proceedings in the mind of any informed and neutral observer. Applying a correct interpretation of the plain error rule, petitioner's judgment of sentence should have been vacated and remanded for resentencing.

II. REAL WORLD EXPERIENCE SHOWS THE IMPORTANCE OF A CORRECT GUIDELINES DETERMINATION.

Because Guidelines calculations often involve technical determinations cloaked in legal jargon, it is easy to lose sight of the human consequences of an erroneous calculation that produces an extended

prison sentence. Amicus FAMM, which regularly corresponds with thousands of federal prisoners and members of their families, has collected the following accounts of real people convicted of federal crimes and sent to prison whose sentences were either extended or reduced by relatively short periods. Theirs are but a few of the many stories FAMM has collected and are representative of experiences shared by clients of NACDL and NAFD members. These accounts illustrate the profound impact that even a few additional months of incarceration can have on a prisoner and the prisoner's family.

Judy McCarroll:

On July 23, 1996, Ms. McCarroll was sentenced to 328 months on a series of counts relating to her involvement in a heroin trafficking operation.[3] On May 12, 2015, following the United States Sentencing Commission's 2014 decision to make a guideline reduction retroactive,[4] the district court reduced Ms. McCarroll's sentence to 235 months, which entitled her to release within months.[5] The next day, May 13, Ms. McCarroll learned she had breast cancer.[6]

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[3] *United States v. Judy McCarroll*, No. 95cr48, Sentencing Order (N.D. Ill., July 23, 1996).

[4] *See* U.S.S.G. Appx. C, amend. 788 (effective Nov. 1, 2014).

[5] *United States v. Judy McCarroll*, No. 95cr48, Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2) (N.D. Ill., May 12, 2015).

[6] Kenosha News, Deneen Smith, "Out of Prison, Into a Tough Spot," (Apr. 19, 2016) (Kenosha News), *available at* http://www.kenoshanews.com/news/out-of-prison-into-a-tough-spot/article_93fc91fb-f97e-557d-b722-b239532e7a2c.html.

Ms. McCarroll, who originally had not been slated for release until 2019, left prison on October 30, 2015,[7] having served more than 20 years. She immediately began aggressive treatment for breast cancer.[8] Her cancer is now in remission.

Ms. McCarroll summed up her prison experience this way: "I've lost so much when I was locked up that I can never get back."[9] While she was incarcerated her father, her mother, and a brother passed away.[10] Children and grandchildren grew up.

When Ms. McCarroll left prison, she was welcomed home, weak and penniless, by her grandson, who was five when she went away and who opened his home to her on her return.[11] Her early release means not only that she can control her own health-care decisions and receive more than minimally adequate treatment, but also that she has been present for the important events that mark new beginnings and the passage of time, such as birthday celebrations and holidays. In September 2016, she was home for the birth of two great-grandchildren, Da'karri and Caleb and in May 2017, she attended her daughter's wedding.[12] Had the sentence reduction not

[7] Bureau of Prisons, Inmate Locator, Judy McCarroll, No. 08864-424, *available at* https://www.bop.gov/inmateloc/.

[8] Kenosha News, *supra* note 5.

[9] *Id.*

[10] Email from Judy McCarroll to Debi Campbell, Communications and Outreach Associate, FAMM (Nov. 27, 2017, 06:32 PM EST) (on file with FAMM).

[11] Kenosha News, *supra* note 5.

[12] Email from Judy McCarroll to Debi Campbell (Nov. 28, 2017, 12:47 PM EST) (on file with FAMM).

been granted, Ms. McCarroll would have been receiving suboptimal cancer treatment in prison, might not yet have held her great-grandchildren, and would have missed her daughter's wedding.

Mickey Randle:

Just as Judy McCarroll's case illustrates the impact of a sentence reduction, so the case of Mickey A. Randle shows the effect of a short extension of the period of incarceration. Mr. Randle is serving a sentence of 188 months, reduced from a longer term as a result of three separate sentence adjustments based on retroactive Guidelines amendments, with an expiration date (after deductions for good time) of March 23, 2019.[13] On November 8, 2017, he learned that he would likely be released from prison by June 2018 following recommendations for 270 days (nine months) halfway house time by his case manager.[14] He understood that the transfer date had been approved by the Chicago-based Residential Reentry Management office overseeing his halfway house.[15]

While he was incarcerated, much changed for Mr. Randle back home. Mr. Randle missed high school

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[13] Order Correcting Clerical Error re: Motion for Modification of Sentence Following a Change in the Sentencing Guidelines, (Apr. 20, 2015); Order Granting in Part Motion for Modification of Sentence Following a Change in the Sentencing Guidelines (Nov. 22, 2011); Order Granting Motion for Modification of Sentence Following a Change in the Sentencing Guidelines (Apr. 29, 2008).

[14] Corrlinks message from Mickey A. Randle to Ann Espuelas, Storyteller and Research Manager, FAMM (Nov. 29, 2017, 09:38 PM EST) (on file with FAMM).

[15] *Id.*

graduations for all but one of his children, and his eldest daughter's wedding.[16] His wife of 27 years, Grace, who stood with him for many of his prison years, passed away in January 2014.[17]

Two years ago, Mr. Randle married his current wife, Myli.[18] Now he is preparing to return home, and she and their blended family are anxious to welcome him. He was confident, despite the news that a number of halfway houses were closing, because the center in his home area was to remain open.[19] Release as planned meant he would be able to attend his son's high school graduation in June.[20] His youngest daughter, who was nine years old when he went to prison,[21] had planned a September wedding and looked forward to walking down the aisle with her father.[22]

But Mr. Randle will not be present for his son's graduation. He learned in mid-November that his halfway house release date will be delayed, for

[16] Corrlinks message from Mickey A. Randle to Ann Espuelas (Nov. 29, 2017, 11:19 PM EST) (on file with FAMM).

[17] Corrlinks message from Mickey A. Randle to Ann Espuelas, (Nov. 30, 2017, 05:29 PM EST) (on file with FAMM).

[18] Email from Myli Thomas to Ann Espuelas (Nov. 29, 2017, 12:12 PM EST) (on file with FAMM).

[19] Corrlinks message from Mickey A. Randle to Ann Espuelas (Nov. 30, 2017, 04:06 PM EST) (on file with FAMM).

[20] Corrlinks message from Mickey A. Randle to Ann Espuelas (Nov. 28, 2017, 09:38 PM EST) (on file with FAMM).

[21] Email from Myli Thomas to Ann Espuelas, Storyteller and Research Director, FAMM (Nov. 29, 2017, 12:12 PM EST) (on file with FAMM).

[22] Email from Myli Thomas to Ann Espuelas (Dec. 4, 2017, 02:17 PM EST) (on file with FAMM).

ostensible Bureau of Prisons budgetary reasons, to November 21, 2018.[23] The delay is likely because the Administration has severed contracts with a number of halfway house facilities in a putative cost-saving measure.[24] His daughter has had to postpone her September wedding to April 2019 so that her father can be there.[25] The impact of this five-month delay in release is tangible and painful.

Mr. Randle writes simply, "My children [have] been disappointed numerous times already, thinking that I would have been home much sooner . . . [T]hat's not only taking a toll on me, but it's taking a toll on them too."[26]

Eric Galanti:

Eric Galanti's story further illustrates how a short period of incarceration can cause significant disruption to the lives of prisoners and their loved ones. He was sentenced on April 14, 2017 to serve eight months' imprisonment for failing to file corporate tax returns.[27] On November 14, he was

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[23] Corrlinks message from Mickey A. Randle to Ann Espuelas (Nov. 29, 2017, 09:38 PM) (on file with FAMM).

[24] *See* Sarah N. Lynch, *Trump Administration Reduces Support for Prisoner Halfway Houses*, Reuters, Oct. 13, 2017, *available at* https://www.reuters.com/article/us-usa-justice-prisons-exclusive/exclusive-trump-administration-reduces-support-for-prisoner-halfway-houses-idUSKBN1CI2ZA.

[25] Email from Mylie Thomas to Ann Espuelas (Dec. 4, 2017, 02:17 PM EST) (on file with FAMM).

[26] Corrlinks message from Mickey A. Randle to Ann Espuelas (Nov. 24, 2017 09:38 PM EST) (on file with FAMM).

[27] Judgment, *United States v. Galanti*, No. 16cr64 (Apr. 14, 2017, W.D. Wa.).

informed by Bureau of Prisons staff that he would be released on January 8, 2018 to spend the final three weeks of his sentence at home.[28] He signed paperwork two days later which included instructions on how to transition to home confinement.[29]

Mr. Galanti suffers from a painful medical condition known as Crohn's disease; in prison, he receives only Prednisone for it, which does little to alleviate his pain.[30] Once he learned of his release to home confinement, he planned to begin the recommended treatment regimen for this condition on January 22.[31] His family also relied on his January 8 return. As soon as they learned of his release date, his father's surgeon scheduled open heart surgery for January 10 so that Mr. Galanti could help his mother care for his father on his release from the hospital.[32]

Unfortunately, Mr. Galanti will not go home in early January. Instead, he learned on November 17 that he would not be released to home confinement at all. Prison staff explained that due to budget cuts, he will stay in prison to serve his entire sentence.[33] He will be released on January 30, 2018.[34] He has been

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[28] Email from Debra Galanti to Ann Espuelas (Dec. 4, 2017, 07:54 PM EST) (on file with FAMM).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.*

[34] Federal Bureau of Prisons, Inmate Locator, Eric M. Galanti, No. 47699-086, available at

forced to postpone his own healthcare to late February, and he will be unable to assist his father's recovery.[35] His mother writes: "I will now have to take care of my husband by myself which I will do, but Eric has to suffer with the horrible pain associated with Crohn's for a much longer time now . . . . Our family has been greatly affected by the cutback of halfway houses."[36] Just a three week difference in the period of imprisonment has had a potent impact on Mr. Galanti and his family.

* * * *

These and countless other real-world examples bring home the fundamental point the Fifth Circuit overlooks: No erroneous judicial decision that produces additional prison time – even an amount of time that may, in the abstract, strike a judge as relatively trivial – can be considered acceptable. Any such error "seriously affects the fairness, integrity, or public reputation of judicial proceedings," *Olano*, 507 U.S. at 736, regardless of whether it would also meet the Fifth Circuit's legally baseless "shock the conscience of the common man" standard.

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https://www.bop.gov/mobile/find_inmate/byname.jsp#inmate_results.

[35] Email from Debra Galanti to Ann Espuelas (Dec. 4, 2017, 07:54 PM EST) (on file with FAMM).

[36] *Id.*

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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